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Whatever rule a State may impose on her own citizens in determining navigability, the rights of the United States remain unaffected. If vested property rights have accrued, Oklahoma is powerless to destroy them by a judicial fiat that although the river is not navigable in point of fact it is navigable in point of law.....

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BREWER-ELLIOTT OIL & GAS COMPANY
et al., appellants,
v.
THE UNITED STATES OF AMERICA ET AL. } No. 52.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

An extended statement is unnecessary. The case involves the title to the bed of the Arkansas River where it flows through the Osage country in Oklahoma. The essential propositions we contend for are three in number:

1. That the river in point of fact is not navigable above its junction with Grand River;
2. Whether it is navigable or not, the Osage Indians, by virtue of various treaties and acts of Congress, acquired title to and now own the river bed;
3. That the courts of Oklahoma are powerless to deprive the Indians of their title by declaring as a

matter of law that the river is navigable throughout its entire course in that state.

The Arkansas River is not in fact navigable at any point above its junction with Grand River, which is 460 miles from its mouth.

The evidence on which the Government relies is discussed, for convenience's sake, under appropriate headings. As we shall presently see, some of the documentary evidence tends to show navigability above this point. But it was completely overcome by other testimony of a more persuasive sort.

The test of navigability is well established. The Arkansas River throughout the stretch in question falls to measure up to this test.

Oklahoma v. Texas, Adv. Op., May 1, 1922;
Economy Light and Power Co. v. United States, 256 U. S. 113;

United States v. Rio Grande Irrigation Co.,
174 U. S. 690.

The Montello, 20 Wall. 430;

The Daniel Ball, 10 Wall. 557.

The Four House Executive Documents.

The evidence largely centers around these documents. The first one is relied upon as showing navigability above the mouth of the Grand. The other three are to the contrary. Accordingly we notice them at the outset:

1. House Executive Document No. 90, 49th Cong., 1st sess. (1885-1886). By the act of August 2, 1882 (22 Stat. 202, 205, 213), Congress appropriated \$20,000 for continuing the improvement of

this river between Ft. Smith and Wichita, and \$35,000 for the removal of snags and obstructions, with a proviso at the end of the act that the sum appropriated for surveys should be used for a continuation of the survey from Ft. Gibson to Wichita. This work was entrusted to Captain Taber, Corps of Engineers, who, under date of January 23, 1886 (281), reported there was no doubt but that a 2-foot channel could be provided whenever the development of the country warrants it; and that the river should, for all purposes of law, be rated as navigable to Wichita. He gives a detailed estimate of the cost of making a 2-foot channel at low water, with a width of from 200 to 800 feet, as far up as Arkansas City. The cost is estimated at \$1,696,900. Much relief, he says, can be given navigation by the removal of snags at a cost of \$20,000.

Taber's report is based on Burrow's survey, the details of which are set forth in a long report under date of November 6, 1884 (287). He divides the river between Wichita and the mouth of the Grand into four stretches: (1) Wichita to Walnut Creek, near the Kansas-Oklahoma line, 71.5 miles; (2) thence to Salt Fork, 57.5 miles; (3) thence to the Cimarron River, 98 miles; (4) thence to the Grand River, 82 miles. He advises against any improvement of the first section, which would be altogether too costly. In the second section the general width from bank to bank is 1,000 feet. To give a 2-foot depth at low water the channel must be narrowed

to 300 feet. In the third section the general width is 1,100. To make the river navigable at low water the channel must be narrowed to 350 or 400 feet. In the fourth section the general width is 1,200 feet, and the channel would have to be reduced to 400 or 500 feet to make the river navigable during low water.

He says it should be borne in mind that no portion of the river within these stretches has ever been considered the head of navigation. Even for a distance of 40 miles below the Grand River commerce is practically nil. On one occasion a small boat made the trip from Little Rock to Arkansas City and return, but was of no practical benefit in demonstrating navigability, the boat being of light draft and the run being made on the crest of one of the short rises in June and July. In summarizing he says that the mouth of the Grand River is at present regarded as the head of navigation and even the traffic between there and Ft. Smith, 94 miles, is very light. He estimates the total cost of improving the river from the mouth of the Grand to the mouth of Walnut Creek to be \$1,840,000. The Chief of Engineers in transmitting Taber's report to the Secretary of War, under date of February 18, 1886, expresses no opinion himself.

2. House Executive Document No. 234, 50th Cong., 1st sess. (1887-88). The House of Representatives on March 12, 1888, passed a resolution calling on the Secretary of War for any information acquired by him subsequent to January 1, 1887, with respect

to that portion of the river between Little Rock and Ft. Gibson. (19 Cong. Rec. 1980.)

Accordingly, the Secrerary of War transmitted a report of Captain Taber dated January 31, 1887, which deals with the river between the two points just named, and a report of the Board of Engineers, dated March 16, 1888, which deals with the river from Wichita to its mouth. This report divides the river into three sections, the first comprising the strip from Wichita to the Canadian River, which is 37 miles below the mouth of the Grand. It is with this strip that we are alone concerned. The report says (p. 317):

The commerce over this section of the river is and always has been practically nothing.

In view of the small low-water flow in this section, which, for two-thirds of its length perhaps, does not exceed 700 cubic feet per second, nor anywhere exceed 1,500 cubic feet; in view of the high slopes of the river, exceeding 3 feet per mile in the upper portion of the section, the board is of the opinion that the cost of any general improvement by contraction works of this section which aimed at obtaining even as much as 2 feet at low water would far exceed the value of the resulting advantages. Indeed, the board has grave doubts as to the possibility of maintaining 2 feet of navigable depth at low water by such means. Should there be in the future sufficient need of steady water transportation along this portion of the valley to justify the expense, movable dams or a canal would be the proper method of ob-

the opinion that navigation was impracticable. The board, whose report we are now considering, says that these figures are incorrect, the discharge not being nearly as great. P. 400.)

4. House Executive Document No. 206, 61st Cong., 2d sess. (1909-1910). The river and harbor act of March 3, 1909 (35 Stat. 822, 831), directed the Secretary of War to cause a preliminary survey to be made between Ft. Smith and Tulsa, the act providing that if the proposed improvement is not deemed advisable, no further action shall be taken, but if the report is favorable the Secretary of War is authorized to cause surveys to be made and to report the cost and advisability to Congress. Major Walker, to whom the task was assigned, in treating that portion between Tulsa and the mouth of the Grand, 65 miles, says that the average width is 1,870 feet; the fall 2.06 feet per mile; the ordinary low-water flow at Tulsa 350 cubic feet per second, and the minimum 175 cubic feet; the range between low- and high water at Tulsa is 16.9 feet; and the ordinary low-water channel depths are from 6 to 12 inches over the shoals. After saying that the steep slope, the small low-water flow, and the shifting sand and gravel preclude any possibility of providing a channel by regulation works, he gives an estimate of the cost of locks and dams. He adds, in speaking of the commercial worth (pp. 462, 463):

The mouth of the Grand River has always been considered as the head of navigation on the Arkansas River, and if there has ever been

any commercial navigation of any sort above that point this office has no information of it. * * *

In view of the foregoing and in compliance with the law directing that an opinion as to the worthiness of an improvement be expressed, I must report that it is my opinion that the Arkansas River between Tulsa and the mouth of the Grand River is not worthy of improvement.

The reviewing board says (p. 466):

In view of the great cost involved, the small existing commerce, and the improbability of any great increase until the river is improved below, the board is of opinion, concurring with the district officer and the division engineer, that this section of the Arkansas River is not worthy of improvement by the United States at this time.

The snag boat "Wichita."

Exhibits 29 to 30X (226-38). These consist of a series of letters written by Captain Evins, of the United States snag boat *Wichita*, to Captain Handbury, the division engineer at Little Rock, beginning September 9, 1881, and ending May 10, 1882, detailing the progress made in moving this snag boat up the river from Ft. Smith. It was the intention to go as far as Arkansas City, but this was found impossible on account of the low water, the boat upon reaching the Pawnee Agency landing being stalled for several months. All attempts to move up to Arkansas City were finally abandoned, and on

February 27, 1882, the boat started back for Ft. Smith, arriving there May 10. The long delay was due to low water, the boat waiting for days at a time for a rising river. These letters describe in detail the difficulties encountered, and completely demonstrate the nonnavigability of the river.

Annual report of operations of the snag boat *Wichita* for the fiscal year ending June 30, 1882, Captain Evins to Captain Handbury (547). He summarizes the trip which has already been mentioned, and says there is no doubt but that a good channel depth of at least 3 feet can be made as far as Arkansas City. (When upon the witness stand he was confronted with this statement and expressed great surprise that he had ever made it.) (555-59.)

Exhibits 31 and 32 (238-41). These are two letters written by Captain Handbury to Captain Evins giving instructions, dated December 10 and 12, 1881. In the latter the statement is made that the knowledge acquired by sending the snag boat up the river has been fully worth what it cost the Government, its operations having demonstrated that the river can not be profitably navigated by steamboats until some radical system of improvement looking to the concentration of the water in the channel has been adopted and carried out.

Exhibit 34 (241-270). This is a copy of Captain Evins' log book, describing day by day the operations of the *Wichita*; the rise or fall of the river; the work accomplished; the difficulties encountered; the inability to move forward; the long waits for rainfall;

the characteristics of the river bed; the temperature; etc. Being an accurate daily record of the *Wichita's* operations up the river, it too completely demonstrates the river's nonnavigability.

Annual Reports of the Chief of Engineers.

1880 (213). The district officer, whose report is included, speaks of certain snagging operations between Ft. Smith and Wichita, and says that the bridge 3 miles above the junction of the river with Grand River renders the former impassable for steamers of any size, and recommends \$40,000 for snagging operations and \$16,300 for a survey.

1881 (222). The district officer at Little Rock, whose report is included, speaks of the construction then under way of a light-draft scow drawing 12 to 14 inches of water, which, when completed, will be sent up the river to Arkansas City to remove snags, etc. He attaches a letter from an Arkansas State senator who sets forth the great desirability of having water commerce with Kansas.

1882 (270). This sets forth in condensed form the difficulties encountered by the snagboat *Wichita*, the statement being made that when she reached the Pawnee agency landing on November 21, 1881, it was impossible to go farther, the boat being detained until February 27, 1882, before there was sufficient water to start on the return trip. The whole time consumed was seven months. The river can be made navigable if the water is confined to a single channel 200 or 300 feet wide, which will

give a low-water depth of $2\frac{1}{2}$ to 3 feet. Before a work of this magnitude is undertaken it is recommended that Congress pass an appropriation to insure an accurate survey.

1883 (273). This merely recites that during the summer of 1882 the operations of the *Wichita* were confined to the removal of snags, etc., below the mouth of the Grand.

1884 (274). This speaks of the *Wichita* being fitted out in March, its operations being confined to the reach below Ft. Gibson, navigation above that point being as yet only prospective. A survey of the river was begun, starting at Wichita; the Pawnee Agency landing was reached June 9; Tulsa will likely be reached July 10; and the entire work will probably be completed by August.

1885 (304). Up to June 30, 1885, \$59,000 has been expended in the removal of snags, etc.; with certain exceptions the river is in excellent navigable condition up to Ft. Gibson; a large outlay will be required to make it navigable above this point. Referring to the field survey completed in July, 1884, the Chief of Engineers says that the assistant's report shows so little water above Ft. Gibson and so many dams above Arkansas City that it seems likely no improvements will be recommended. A steel steamer with a fleet of five steel barges, none drawing over 12 inches, has been put on between Arkansas City and Ft. Gibson, which will probably produce a revolution in the navigation of the upper reaches of shallow rivers.

1886 (344). Merely deals with the sums expended in making a survey.

1890 (345). Deals with the removal of obstructions. Refers to the act of August 11, 1888, appropriating \$150,000, which prohibits this from being used in accordance with the Board of Engineers report of March 16, 1888. Speaks of the snag boat *Wichita* being reconstructed in 1889 and operating over the reach between Webbers Falls and Little Rock.

1891 (351). Gives a detailed statement of the total sums appropriated and the balance unexpended.

1894 (359). Not navigable above Webbers Falls (31 miles below the mouth of the Grand) was reported.

1895 (360). Lieutenant Sibert's report of July, 1895, in which he gives an abstract of the work done from 1868 to 1894 is attached. In only one of the years is any removal of obstructions above the mouth of the Grand reported. This is 1885.

1896 (364). This is practically a repetition of the preceding year, the additional part covering snagging operations for the current fiscal year.

1897 (370). Contains Captain Sibert's report for 1897. The latter says that the project and estimate for the improvement of the whole river was made in three parts: (1) 1885, annual report of the Chief of Engineers, Little Rock to mouth; (2) 1888, annual report, Chief of Engineers, Ft. Gibson to Little Rock; (3) House Executive Document No. 90, Forty-ninth Congress, first session, Arkansas

City to Ft. Gibson. The act of August 11, 1888, he says, adopts a project for improving the river from Wichita to the mouth, distinctly mentioning the plans, which include the estimates from Ft. Gibson to Arkansas City. No estimate, he says, has ever been made or approved between Arkansas City and Wichita. In speaking of commercial statistics he says that boats ply as far as Webbers Falls.

1899 (378). Under commercial statistics he says, apparently referring to the State of Arkansas, that the steamboats report the river navigable during all of the year ending June 1, 1899, and gives a list of the vessels that navigated the river in that State between May 31, 1898, and June 1, 1899.

1900 (449). Contains discharge observations at various points between the mouth and Arkansas City.

1902 (449). Except for a single trip of the *Carrie Clyde* from the mouth to the mouth of the Grand, no navigation was reported above a point 88 miles below Ft. Smith.

1903 (450). Reports that although Ft. Gibson is the head of navigation there was no report of any navigation above Webbers Falls, which is 31 miles below the mouth of the Grand.

1904 (451). A similar report.

1905 (452). Substantially the same.

1906 (452). Substantially the same. The duration of the navigable periods in different stretches as far up as the mouth of the Grand is also given. The

statement is made that Ft. Gibson is the head of steamboat navigation.

1907 (452). Substantially the same. No report of any commerce above Webbers Falls was received.

1908 (453). The statement is made that Ft. Gibson is the head of steamboat navigation. The duration of navigable periods varies greatly, there being occasional periods when navigation is suspended throughout the entire stretch: and on the other hand, there are periods when 3-foot navigation is maintained up to Ft. Gibson throughout the year. The maximum draft that can be carried at ordinary low water is given. Between Webbers Falls and the Grand it is 1 foot.

1909 (453). Substantially the same. The Muskogee-Oklahoma Packet Company, which built a boat to ply between Muskogee and Ft. Smith, did no business. The District Officer reports that in an effort to revive steamboat navigation between Ft. Smith and Muskogee, the *City of Muskogee* was built but did nothing, the persons interested in the enterprise representing that attempts to navigate were abandoned both because of natural and artificial obstructions. No navigation above Webbers Falls is reported.

1910, 1911, 1912, 1913, and 1914 (467-69). The statement is made that no navigation was reported above Webbers Falls, 31 miles below the mouth of the Grand. In the reports for 1912, 1913, and 1914 it is said that the general improvement project covers

the navigable portion extending from the mouth to the mouth of the Grand, 461 miles.

Oral testimony introduced by the Government.

Brigadier General Sibert testified (1915) that when he was at Little Rock ('94-'99) he found no data showing commerce moving above the mouth of Grand River and never knew of any practical navigation above that point. Referring to the stretch from Tulsa to the mouth of the Grand, he thought at least 3,000 cubic feet per second discharge was necessary for a proper channel; that if fixed dams were used, they would fill up with moving sand; that he does not recommend locks and dams above the mouth of the Grand, and does not believe they would afford a reliable route (478).

Edward Houston, whose testimony was reproduced from *Kansas v. Colorado*, said that he had been steamboating on the river since 1855 between its mouth and Ft. Gibson, which was considered the head of navigation; that the flow of the river is substantially the same; that 1861 is the lowest year he knows of; that in 1858 the river at the mouth of the Grand was so low that cattle could walk over it (485).

David D. Chapman, testifying in *Kansas v. Colorado*, said that he had had 40 years' experience in steamboating; that he has lived at Argenta, opposite Little Rock, since 1864; that the river now is four times as wide at that place, the banks caving away all the time; that he was the captain of the *Aunt Sally*, which in 1878 made the run from Little

Rock to Arkansas City; that she drew 16 inches light and 24 inches loaded; that he made the trip to earn a reward of \$700; that he spent about six days at Arkansas City, and when he noticed the river began to fall, started back, running light; that the river from bank to bank is wider, but the volume of water is about the same; that the stream above the Grand is treacherous and incapable of practical navigation; that the river is one of shifting sands and varying depths; and there is not enough money in the United States Treasury to make it navigable the year round (489).

M. M. Murdock, testifying in *Kansas v. Colorado*, said that for political reasons in Kansas they began advocating the navigability of the Arkansas; that an engineer had told him a channel for small boats could be constructed from Wichita to Arkansas City; that in 1870 Walton built a flatboat at the latter place, which turned back when it got within 10 miles of the former; that before the railroad was extended they hauled lumber from Wichita to Arkansas City with small boats, but no boat ever got back; that the river is not and never was navigable for any practical purpose (495).

R. E. Cook, a note teller at a Muskogee Bank, was once a licensed pilot; in 1901 he brought the *Carrie Clyde*, which he purchased himself in Kentucky, up the river to Muskogee; when the railroad bridge was raised he then sent her still farther up to a place called Choskey, 20 miles from Muskogee; after being

loaded with lumber she attempted to return, but ran into a sand bar, from which they were never able to get her off; the *City of Muskogee* was purchased by the Muskogee Chamber of Commerce to demonstrate to Congress the river's navigability; he brought her (1908) from Cincinnati to Muskogee, where for a while she was an object of great curiosity; she made no more trips and was finally sold to a gravel company, which moved her to the mouth of the Grand, where her engines were employed to pump sand on the barges; the *Mary D*, which was a smaller boat, was also brought to Muskogee to influence freight rates and demonstrate navigability; she was taken on a number of trips to Redlands, 114 miles down the river in the direction of Ft. Smith; to-day a boat of her size could be used between Redlands and the mouth of the Grand and in high water as far as Choskey (497).

Mike Conlan was familiar with the river from 1885 to 1892; he ran a steamboat of 100 tons, the *William Druhe*, between Muskogee and Ft. Smith for about 6 years; on one occasion he took her up the river about 18 miles above the mouth of the Grand, it being necessary to pull her with a line for about 4 miles; in 1891 he bought some logs, which he assembled at the mouth of the Cimarron, intending to float them down the Arkansas to Tulsa; the water was so low the effort was abandoned; the *Jennie May*, the *Cleveland*, and the *Border City* were also on the river at the same time plying below Ft. Gibson;

the *Jennie May* struck a snag and was sunk; the *Cleveland* was sold to the Government for use at a point 12 miles above Ft. Smith; the *Border City* ran as a rule between Ft. Smith and Webbers Falls (503).

Sam P. Brooks testified that in April, 1897, he placed $2\frac{1}{2}$ tons of hay on a 12×40 boat drawing 4 inches empty and 8 inches loaded; that they started at Blackburn, 20 miles above Cleveland, and 60 miles above Tulsa; that they had so much trouble in navigating that in reaching Cleveland they sold the hay and proceeded empty to Tulsa; that this part of the trip, too, was hard to make; that the boat was then used as a ferry at Tulsa for about 5 years; that the channel continually changes, the river bed being about 1,400 feet wide; that at times the people ford the river for half a year; that there are some skiffs, a gasoline launch, and a few houseboats at Tulsa, but no commerce is carried up or down.

John C. McLaughlin gave similar testimony and related the difficulties in ferrying at Tulsa, it being necessary to change the route as the channel changed. He related how a man named Poole tried to haul lumber with a 16×56 boat drawing 10 or 12 inches, the troubles encountered, and how Poole finally sold his boat to Brooks who operated the ferry. Merchandise can not be carried successfully up and down the river (511).

A. W. Guffney ran ferryboats near the mouth of the Cimarron. The sand bars were continually changing, here to-day and there to-morrow. You may cross at a place in the morning but when you return in the

afternoon you may find it necessary to pick a new course. The rises come and go but no one can predict the time. Ortnier built a little steamboat and took it from Cleveland to the mouth of the Cimarron where it was sold to Poole subsequent to 1888 and he never saw it afterwards. He has never known of any boats running up and down the river. It is even impossible to run logs down in ordinary low water unless some one is at hand to push them off the sand bars which are continually forming even during ordinary low water, to say nothing of ordinary high water. He has been engaged in ferrying across the river, a pole being used (515).

J. J. Harmon bought the *City of Muskogee*, which was brought to Muskogee by the Commercial Club in 1908 to demonstrate navigability and lower freight rates. He used it as a hydraulic dredge and later sold it. It was taken down the river to the Mississippi. He has never seen any commerce on the Arkansas above its junction with the Grand (521).

P. R. Van Frank, jr., has been connected with the Little Rock office since 1891 and assisted the engineer's office in the preparation of Sibert's report, Exhibit 65; House Document No. 150, 56th Cong., Exhibit 49; and House Document No. 206, 61st Cong., Exhibit 59. At extreme low water the flow of the Grand is nearly three times that of the Arkansas. At no time during his incumbency in office did he find any trade above the mouth of the Grand and does not think it feasible to make a channel of any

width for navigable purposes by contracting works. By building locks and dams at the cost given in Major Walker's report, the river can be made navigable between Tulsa and Ft. Gibson (527).

Charles H. Miller, a civil engineer, after detailing the conditions of the river above the mouth of the Grand, said that he did not think it feasible to create a navigable channel by canalization works. He went over the river in November, 1915, from Cleveland to Tulsa in two small boats to obtain data for testifying and related the great difficulties encountered. There is a possibility of improving the river by movable dams, but dredging equipment would have to be maintained at all seasons, and during extreme low water it would be impossible to maintain the channel. The discharge of the Grand during low water is much greater than that of the Arkansas just above. Without artificial improvement the Arkansas above the Grand has no navigable capacity. Even if the river were canalized a naphtha launch could not be taken over it because the launch would draw more than 12 inches and there would not be enough water (540).

Joseph Evins, 82 years, rehearsed the principal events in the trip of the *Wichita* above the Grand in 1881-82. He has boated the river but never attempted to go above the Grand. He does not think it feasible. He has no knowledge of anyone conducting business on the river above that point. Since 1860, when he first knew the river, it has not been

mouth, dated New York City, March 16, 1888, and contained in House Executive Document 234, 50th Cong., 1st sess. He is directed to spend this amount as contemplated in the report of the Chief of Engineers for the year ending July 1, 1885, and as authorized in the river and harbor act of August 5, 1886, and in House Executive Document 90, 49th Cong., 1st sess.; \$25,000 is also appropriated for removing obstructions, \$10,000 of which is for constructing a new hull for the snag boat *Wichita*, and \$3,756 for completing survey and maps.

September 19, 1890, 26 Stat. 445, \$180,000, for continuing improvement from Wichita to its mouth, and \$20,000, for operating snag boats.

July 13, 1892, 27 Stat. 103, \$250,000, for improving the river in Arkansas and Indian Territory (Kansas not included), two-fifths to be expended from the mouth to Little Rock, two-fifths from Little Rock to Ft. Smith, and one-fifth above Ft. Smith.

August 18, 1894, 28 Stat. 353, \$250,000, for improving the river in Arkansas and Indian Territory, two-fifths to be expended from the mouth to Little Rock, two-fifths from Little Rock to Fort Smith, and one-fifth above Fort Smith; \$20,000 is also appropriated for removing obstructions.

June 3, 1896, 29 Stat. 223, \$100,000, for improving the river in Arkansas and Indian Territory; and \$20,000 for removing snags.

March 3, 1899, 30 Stat. 1141, \$100,000, for improving the river in Arkansas and Indian Territory; and

\$20,000 for removing obstructions. The President is authorized to appoint a board of three engineers to examine the river and report a plan for its permanent improvement, etc.

June 13, 1902, 32 Stat. 357, \$110,000, for improving the river in Arkansas, removing obstructions and operating snag boats, the Secretary of War being authorized in his discretion to operate a suitable dredge boat to keep open a navigable channel as far up as he may deem advisable.

March 3, 1905, 33 Stat. 1132, \$35,000, for the maintenance of improvement of the river in Arkansas.

March 2, 1907, 34 Stat. 1092, \$35,000, for maintenance in Arkansas. "The Secretary of War may appoint a board to make an examination of said river to Muscogee, Indian Territory, with a view to ascertaining whether any feasible or desirable plan can be devised for the further improvement of the whole of said river to Muscogee or any portion thereof."

March 3, 1909, 35 Stat. 831, \$700,000, for examinations, surveys, etc., and authorizing the Secretary of War to report an estimate of the cost to make the river navigable from Ft. Smith to Tulsa.

June 25, 1910, 36 Stat. 651, \$375,000, for the construction and operation of two dredge boats to be operated between the mouth of the river and Ozark; and \$51,000 for improvement at Pine Bluff.

February 27, 1911, 36 Stat. 945, appropriating \$62,500, for maintenance of improvement in Arkan-

sas, including works at Pine Bluff and the operation of dredging plant.

July 25, 1912, 37 Stat. 214, \$30,000, for improvements in the State of Arkansas.

March 4, 1913, 37 Stat. 814, \$48,000, for maintenance of improvement in Arkansas and Oklahoma, including works at Pine Bluff and the operation of dredging plant, with a special appropriation of \$30,000 for certain designated improvements in Arkansas, near Van Buren.

March 4, 1915, 38 Stat. 1055, § 14, which provides that the projects therein designated, among which is the Arkansas river in Arkansas and Oklahoma, shall be reexamined, in accordance with law for the original examination of rivers and harbors, with a view to obtaining reports whether they shall be modified or the improvement abandoned.¹

July 27, 1916, 39 Stat. 399, \$234,700, for maintenance of improvement in Arkansas and Oklahoma, including bank protection at Pine Bluff and Little Rock and operation of dredging plant.

August 8, 1917, 40 Stat. 257, \$35,000, for snagging operations in Arkansas and Oklahoma.

June 5, 1920, 41 Stat. 1010, § 2, 1012, authorizing the Secretary of War to make preliminary examinations and surveys of the river from Little Rock to the mouth of the Grand.

¹ See House Document 461, 64th Cong., 1st sess., containing the reexamination. It was not introduced in evidence, probably because it was not then published. It, too, demonstrates nonnavigability above the mouth of Grand River.

These statutes may, roughly speaking, be grouped as follows:

(a) From 1835 to 1878 the appropriations are simply for the improvement of the river.

(b) In 1878 provision is made for the examination, survey, etc., from Ft. Smith to the mouth of the little Arkansas.

(c) From 1879 to 1890, for improving the river as far up as Wichita.

(d) Directing, in 1886, the improvement of the river in accordance with Executive Document No. 1, 49th Cong. (this relates to the part between Little Rock and the mouth; see 4 House Exec. Doc., 49th Cong., 1st sess., 1601); prohibiting, in 1888, any improvement along the lines contained in House Executive Document No. 234, 50th Cong.; and authorizing, in 1888, improvements in accordance with House Executive Document No. 90, 49th Cong.

(e) Beginning in 1892 and ending in 1899 appropriations are made for improving the river in Arkansas and Indian Territory. Kansas is excluded. In 1899 the President is authorized to appoint a board of three engineers to report a plan for the permanent improvement of the river.

(f) From 1902 to 1912 the only appropriations are for the improvement of the river in Arkansas. Neither Indian Territory nor Kansas is mentioned. In 1907, however, the Secretary of War is authorized to appoint a board to examine the river as far up as Muskogee (opposite the mouth of the Grand), in

order to ascertain whether a feasible plan can be devised for improving the river to that place. In 1909 the Secretary of War is authorized to report an estimate of the cost of making the river navigable between Ft. Smith and Tulsa.

(g) In 1913 an appropriation is made for maintenance of improvement in Arkansas and Oklahoma; and in 1915 it is provided that the river in Arkansas and Oklahoma shall be reexamined in accordance with law for the original examination of rivers and harbors, with a view to obtaining reports whether the project shall be modified or the improvement abandoned. (For the law governing the original examination of rivers and harbors, see act of June 13, 1902, 32 Stat. 372, § 3; and act of March 4, 1913, 37 Stat. 825, §§ 3 and 4.)

(h) In 1920 the Secretary of War is authorized to make preliminary examinations and surveys from Little Rock to the mouth of the Grand.

Miscellaneous documents.

Lieutenant Wilkinson's expedition down the Arkansas River in 1806 (199). Beginning at an undesignated point, apparently in Kansas, on October 17, his canoe grounded and was abandoned. Marching on land along the river he reached the Osage country, where another canoe was built. This, too, grounded, but he pressed on. Proceeding down the river the provision canoe upset, but he continued on to Neshalonska (Salt Fork of the Arkansas). Proceeding on, his boats again grounded causing his men

great suffering on account of the severity of the weather. The river during all this time was filled with ice which probably contributed to the grounding.

Excerpt from S. H. Long's expedition. The date is not given, but it was 1820. He says that "this part" of the Arkansas can not be considered navigable except for light boats during a freshet (202).

Colonel Long, of the Corps of Topographical Engineers, in his report of December 20, 1853, considers the river within the territory of the Creek Nation as nonnavigable. His report is embodied in Col. J. J. Abert's report transmitted to the Senate on January 27, 1854, by the Secretary of War. (Executive Document No. 26, Senate, 33d Cong., 1st sess.) (192). It appears from this report that the Arkansas River was navigable only to the junction of the Verdigris and Neosho (Grand) Rivers, and even navigability to that point was potential rather than actual. Abert says that even throughout the navigable portion the channel is narrow and crooked and the current rapid, with rocky reefs and bars at every bend (203).

House Document No. 129, 33d Cong., 1st sess., 1854 (204). The Secretary of War transmits a report to the effect that a body of army officers camped at Ft. Atkinson, where they found the river unusually high, although they were told by other army officers that two years before at the same season it was necessary to dig into the bed of the river to get water to drink.

Excerpt from expeditions of Pike (1864). He says it is a queer river, some seasons so dry you can't wet your foot in it for miles, sometimes a raging flood (222).

House Executive Document No. 295, 41st Cong., 2d sess., 1869-70 (205). Abert says in his survey of the river that it can not be navigated above its junction with the Verdigris.

Excerpt from Lieutenant Dodge's book (1877) entitled "Great Plains of the West" (212). He speaks of the peculiar characteristics of the river, high at one moment and low at the next, the channel continually changing and the sand bed in many places being perfectly dry for a month or more of every year.

House Executive Document No. 94, 45th Cong., 3d sess., 1878-79 (206). Under date of 1879 Major Suter makes a report to the Chief of Engineers in which, in transmitting the report of McKown, assistant engineer, he recommends the removal of snags in the lower portion of the river, saying that this is all that is worth doing until its general improvement is undertaken. McKown in his report (1879) gives an approximate cost of improving the river "for steamboat navigation at low water," his survey beginning at Wichita and continuing down the river to Fort Smith.

Report of J. H. Curtis, assistant engineer (1881), to Capt. Handbury on the improvement of the river between Wichita and Ft. Smith. In August, 1880,

he set out from Ft. Smith for Wichita to make inquiries of the residents with respect to the river's improvement. October 1 he left Wichita on the return trip, proceeding down the river with skiffs, which had to be dragged for considerable distances until the Cimarron River was reached. A record of obstructions having been kept on the downward trip, he proceeded up the river on November 22 with two flat-boats to remove snags and bowlders, skiffs being employed to haul the outfit. On December 23 he was frozen in 25 miles above Arkansas City. He built another boat with a draft of 7 inches, and on February 5 attempted to resume work, but ice and floods interrupted. Finally, about February 10, all the property was stored and the work suspended.

Senate Executive Document No. 120, 50th Cong., 2d sess., 1888-89 (204). This says that it must be remembered that the upper Arkansas, the North Platte and the South Platte are not navigable, all being broad, muddy rivers and so shallow as to be impassable even for canoes during the greater part of the year.

In the report of Captain Bell, who led a detachment of Major Long's party down the river in 1820, the statement appears that Ft. Gibson is considered the head of navigation (205).

Census report 1890 (193). This apparently places the head of navigation either in Colorado or the western part of Kansas, for it says:

Commencing at the head of navigation on the Arkansas and then following down through

the fertile valley tributary to it, the cities of Wichita, Arkansas City, Fort Smith, Dardanelle, Little Rock, and Pine Bluff, etc.

The Secretary of the Interior says that in *Kansas v. Colorado*, 206 U. S. 46, the Interior Department took the position that the Arkansas was not navigable beyond Ft. Gibson (193).

Transactions of the Kansas Academy of Science, reading "A Dying River," undated (195). The author says that he learned from a noted plainsman, William Matthewson, that as early as 1852 boats were built at Pueblo, Colo., in which mountain traders and trappers, sometimes 15 or 20 in one boat, floated down the swift current of the river to Arkansas, and that from 1870 to 1880 boats were built at Wichita to descend the river, some being propelled by steam. In one instance two young men built a boat at Wichita and navigated the river and Gulf to Florida. As the title indicates, the article, which is written in a singularly florid style, is an attempt to show that the river is dying. "During most of the year 1893 the Arkansas River above the junction of the little river has been entirely dry; below that point it is an insignificant stream which a schoolboy can roll up his pants and wade across. In a comparatively short time, in southern Kansas, timber will occupy the former site of the Arkansas River, through which will flow a stream a few rods wide."

Letter from Captain Sibert to the Chief of Engineers dated April 8, 1898 (469-78). This deals

with the question whether the irrigating ditches in the upper part of the Arkansas River have diminished the flow in the lower reaches. After setting forth the data at great length, he concludes that the navigable capacity remains unaffected. He quotes from Humphrey and Abbott's report on the Mississippi, made in 1861; and in referring to the Arkansas they evidently treat Ft. Gibson as the head of navigation. He also quotes from Abert's Survey of 1869 to the effect that the river can not be navigated above the Verdigris (about 1 mile above the Grand).

The fact that the river was meandered is of little significance in determining the question of navigability.

Oklahoma v. Texas, Adv. Op., May 1, 1922.

The fact also that Congress has enacted statutes authorizing the construction of railroad bridges across the river is far from being decisive.

Oklahoma v. Texas, Adv. Op., May 1, 1922.

Irrespective of the question of navigability, the title of the Osage Indians to the river bed extends to the main channel. The Circuit Court of Appeals was right in so holding.

The doctrine of *Pollard v. Hagan*, 3 How. 212, while well established, has its limitations.

Shively v. Bowlby, 152 U. S. 1;

United States v. Winans, 198 U. S. 371;

Cf. Prosser v. Northern Pacific Railroad Co.,
152 U. S. 59.

The title to the river bed and to the land on both sides was at one time vested in the Cherokee Indians by virtue of the following acts and treaties:

Treaty of July 8, 1817, 7 Stat. 156;

Treaty of May 6, 1828, 7 Stat. 311;

Act of May 28, 1830, 4 Stat. 411;
 Treaty of February 14, 1833, 7 Stat. 414;
 Treaty of December 29, 1835, 7 Stat. 478;
 Treaty of August 6, 1846, 9 Stat. 871;
 Treaty of July 19, 1866, 14 Stat. 799.

And see patent of December 31, 1838 (146).

(The acquisition of title by the Cherokees is set forth at length in *Heckman v. United States*, 224 U. S. 413.)

The Osage Indians succeeded to the Cherokee title, within the limits alleged in the bill of complaint, by virtue of the following treaties and acts:

Treaty of September 29, 1865, art. 16, 14 Stat. 687;
 Act of July 15, 1870, 16 Stat. 362;
 Act of June 5, 1872, 17 Stat. 228;
 Act of March 3, 1873, 17 Stat. 538;
 Act of March 3, 1883, 22 Stat. 624;
 Also the deed of June 14, 1883 (152).

The foregoing act of June 5, 1872, after reciting the Cherokee treaty of 1866, the act of 1870, the fact that the Osages had been removed from Kansas to a tract selected for them in the Cherokee country, and that the Cherokees had signified their approval, then declared:

The following-described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the *main channel of the Arkansas*

River, and on the north by the south line of the State of Kansas.

The act of March 3, 1873, directed the Secretary of the Treasury to transfer from the proceeds of the Osage Indian lands in Kansas to the credit of the Cherokee Indians \$1,650,600, "to pay for lands purchased by the Osages from the Cherokees," in accordance with the act of June 5, 1872, and the acts and treaties therein mentioned.

The conveyance from the Cherokees to the United States in trust for the Osages, dated June 4, 1883 (152), cites the Cherokee treaty of 1866, the acts of June 5, 1872, March 3, 1873, and March 3, 1883, and conveys to the United States in trust for the Osage Indians the tract of country described in the act of June 5, 1872, except that, instead of bounding it in the granting act, by "the main channel of the Arkansas River," it is described by townships and fractional townships, "the fractional townships being on the left bank of the Arkansas River."

This description would operate, if the stream were navigable, to convey only to the shore line (R. S. 2476). But the deed was made pursuant to the act of June 5, 1872, which confirms to the Osage Nation the tract of country bounded by "the main channel of the Arkansas River"; and pursuant to the act of March 3, 1873, directing payment to the Cherokees from the Osage funds for the lands so described.

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A deed was not necessary to transfer the title, and could neither add to nor subtract from the rights which the Osages already possessed.

Jones v. Meehan, 175 U. S. 1, 10;

Francis v. Francis, 203 U. S. 233, 237;

Choate v. Trapp, 224 U. S. 665, 673.

The treaties entered into with the Cherokee Indians show on their face that the territory secured to them west of the Mississippi was never intended to be incorporated within the limits of any State. The doctrine of *Pollard v. Hagan* is accordingly inapplicable.

See preamble to treaty of May 6, 1828, 7 Stat. 311. This recites the anxious desire of the United States to secure to the Cherokees "a permanent home, and which shall under the most solemn guaranty of the United States be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension in any way of any of the limits of any existing Territory or State."

Act of May 28, 1830, § 3, 4 Stat. 412.

Treaty of February 14, 1833, Art. 5, 7 Stat. 414.

Treaty of December 29, 1835, Art. 5, 7 Stat. 478. "The United States hereby covenant and agree that the land ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory."

Appellant's contention that the Court of Appeals failed to give heed to *Pollard v. Hagan* is without merit. The Cherokee Indians and their successors, the Osage Indians, acquired a vested title to the bed of the stream, which is protected by the constitution.

Choate v. Trapp, 224 U. S. 665.

The case on which appellant relies, *Ward v. Race Horse*, 163 U. S. 504, itself points out the distinction between the state's police power and vested property rights. In this case Oklahoma is not asserting any police power. It is attempting, on the contrary, to augment its income by leasing oil and gas rights on the supposition that it owns the river bed.

Whatever rule the state may impose on her own citizens in determining the question of navigability, the rights of the United States remain unaffected. If vested property rights have accrued, Oklahoma is powerless to destroy them by a judicial fiat that although the river is not navigable in point of fact it is navigable in point of law.

The United States was not a party to *State v. Nolegs*, 40 Okl. 479. That decision accordingly is not controlling.

Oklahoma v. Texas, Adv. Op., May 1, 1922.
Economy Light and Power Co. v. United States, 256 U. S. 113.

To say that the Osage Indians can be deprived of their rights to the river bed by a judicial declaration of the Oklahoma courts that the river is navigable in point of law, is to say that the federal constitution affords them no guaranty.

See *Choate v. Trapp*, 224 U. S. 665;
 Cf. *Ettor v. Tacoma*, 228 U. S. 148.

If a river is unnavigable, a riparian patentee takes title to the center of the stream.

Rev. Stat. Sec. 2476.

Railroad Company v. Schurmeir, 7 Wall. 272.
Oklahoma v. Texas, Adv. Op., May 1, 1922.

The Osage Indians under the acts of Congress already mentioned, as well as under the Cherokee

Nation deed of June 14, 1883, obviously acquired no lesser rights.

Whether the Osage Indians took title to the river bed is essentially a Federal and not a State question.

In *Packer v. Bird*, 137 U. S. 661, it is said:

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.

To the same effect:

Shively v. Bowlby, 152 U. S. 1;

Bagnell v. Broderick, 13 Pet. 437;

McCune v. Essig, 199 U. S. 382;

Wadkins v. Producers Oil Company, 227 U. S. 368;

Northern Pacific Railway Co. v. Townsend, 190 U. S. 267.

It is needless to add that when rights are acquired under federal legislation, the States are powerless to strike them down.

The decree of the lower court, it is respectfully submitted, should be affirmed.

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